IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 64317-7-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
VALENTIN G. SOLODYANKIN,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: July 19, 2010
	)	
	)	

Cox, J. — To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.[1] Here, because Valentin Solodyankin cannot show that his trial counsel's decision to withdraw self-defense instructions was objectively unreasonable, we affirm.

Aleksander Vasilyev and his father Yuriy Vasilyev work in the shipping industry. Acting as "the middle man," the Vasilyevs pick up and store cars from customers and deliver them to truck drivers who transport the cars to other states. The truck drivers pay the Vasilyevs a fee for storing and delivering the cars. Most of the truck drivers pay the Vasilyevs cash when the Vasilyevs

[1] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

deliver the car or cars to the truck driver.

On April 1, 2008, the Vasilyevs delivered two jet skis to Solodyankin for delivery to Florida. Upon delivery, the Vasilyevs requested a $95 payment, but Solodyankin told them he had no cash. After several phone calls to Solodyankin's boss and others, the Vasilyevs insisted that Solodyankin either pay cash or they would make other arrangements for the transport of the jet skis. Solodyankin then grabbed some cash from his truck and threw it toward the Vasilyevs.

Solodyankin then walked to his truck trailer as he cursed at the Vasilyevs. Yuriy asked Solodyankin something to the effect of "What are you doing?" Solodyankin turned around and hit Yuriy in the face with his fist. Aleksander testified that Yuriy had not done anything to incite Solodyankin to punch him, such as making threats or stating that he was going to do something.

Aleksander then approached his father and Solodyankin. Solodyankin began to swing punches at Aleksander, but he missed. Aleksander grabbed Solodyankin's jacket, but while Aleksander was holding him, Solodyankin was able to grab a crowbar. Solodyankin then swung the crowbar. The crowbar hit Yuriy in the arm.

The physical altercation ended at that point, and Solodyankin put the crowbar inside his truck. Aleksander called 911.

The State charged Solodyankin with assault in the third degree on grounds that "with criminal negligence," Solodyankin caused bodily harm to

Yuriy "by means of a weapon or other instrument or thing likely to produce bodily harm, to-wit: a crowbar."

Aleksander, Yuriy, and two police officers who responded to the 911 call testified for the State at trial. Solodyankin did not call any witnesses and did not testify. When the court heard arguments from both sides about proposed jury instructions after the State rested, defense counsel withdrew a proposed self-defense instruction. A jury found Solodyankin guilty as charged.

Solodyankin appeals.

EFFECTIVE ASSISTANCE OF COUNSEL

Solodyankin argues that he was denied effective assistance of counsel because his trial attorney failed to seek an instruction on and argue self-defense. Because Solodyankin does not demonstrate that counsel's performance was deficient, we reject this claim.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.[2] The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[3] To show prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome of

[2] Strickland, 466 U.S. at 687; McFarland, 127 Wn.2d at 334-35.

[3] McFarland, 127 Wn.2d at 336.

the trial would have been different.[4] If one of the two prongs of the test is absent, we need not inquire further.[5]

A defendant is not entitled to a jury instruction unsupported by the evidence.[6] Specifically, counsel is not required to argue self-defense where the defense is not warranted by the facts.[7]

In Washington, the use of force upon or toward the person of another is not unlawful if "used by a party about to be injured . . . in preventing or attempting to prevent an offense against his or her person . . . in case the force is not more than is necessary."[8] To prove self-defense, there must be evidence that: (1) the defendant subjectively believed he was about to be injured; (2) this belief was objectively reasonable; (3) the force used was for the purpose of preventing or attempting to prevent an offense against his person; (4) the force used was not more than necessary; and (5) the defendant was not the aggressor.[9]

To satisfy the first prong of the test for ineffective assistance of counsel,

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[4] In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

[5] Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007 (2007).

[6] State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

[7] State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979).

[8] RCW 9A.16.020(3).

[9] RCW 9A.16.020(3); 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 17.02, at 253 (3d ed. 2008); see also State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997).

Solodyankin must show that his attorney's decision not to seek a self-defense instruction was objectively unreasonable.[1] Solodyankin contends that his attorney should have advanced the theory of self-defense because it was supported by the evidence. This argument is unpersuasive.

Here, defense counsel initially proposed self-defense instructions, but later withdrew them when Solodyankin exercised his right not to testify at trial. Solodyankin does not challenge his decision not to testify. And we see nothing in the record to support any challenge to that decision. For example, it would have been entirely appropriate for counsel to advise and inform Solodyankin that had he chosen to testify, his testimony would have been subject to impeachment.[11] The record shows that Solodyankin made statements to officers that were inconsistent with the theory of self defense and that officers found much more cash in Solodyankin's truck than he had admitted having. Additionally, during pre-trial motions, the trial court granted the State's motion to allow ER 609 evidence of a previous conviction in the event that Solodyankin testified.

Because Solodyankin chose not to testify, there was no evidence in the record that he subjectively believed he was about to be injured, as the first element of self-defense requires.[12] Another element of self-defense requires

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[1] Strickland, 466 U.S. at 687.

[11] See State v. Robinson, 138 Wn.2d 753, 763, 982 P.2d 590 (1999).

[12] See RCW 9A.16.020(3); Callahan, 87 Wn. App. at 929.

that the evidence show that Solodyankin was not the aggressor.[13] The evidence in the record is that he first punched Yuriy in the face. While there may have been debate about whether this punch made Solodyankin the aggressor for purposes of self-defense, the trial court would have been well within its discretion to decide that it did.[14] In any event, this could have been an additional reason for the court to refuse to give a self-defense instruction.

We also note that in closing argument, defense counsel sought to undermine the Vasilyevs' credibility because neither was able to identify Solodyankin as the assailant in court. Defense counsel also pointed out that there were many inconsistencies between Yuriy's and Aleksander's testimony as to the sequence of events that led to the charged assault. Defense counsel also argued that it was possible that Yuriy's injuries could have been caused by something other than the crow bar.

All of these arguments would have been undermined by a claim that Solodyankin had used force because he subjectively believed he was about to be injured and that this belief was objectively reasonable, as self-defense

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[13] See Callahan, 87 Wn. App. at 929; State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999) ("[I]n general, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action.").

[14] See, e.g., State v. Craig, 82 Wn.2d 777, 783-84, 514 P.2d 151 (1973) (defendant could not "avail himself of a claim of self-defense" where defendant admittedly engaged in conduct which gave the victim good cause to believe that he was threatened with bodily harm).

requires.[15] Rather, counsel made the tactical decision to argue the existence of reasonable doubt.

In sum, these decisions by defense counsel were objectively reasonable. There was insufficient evidence in the record to request a self-defense instruction. Moreover, the giving of such an instruction would have undermined the tactical choice to pursue arguing reasonable doubt. Both decisions were objectively reasonable under the circumstances of this case.

Because Solodyankin cannot show the absence of legitimate tactical reasons for counsel's decisions, we need not address whether the challenged conduct prejudiced his trial.[16]

There is no showing of ineffective assistance of counsel.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Spearman, J.

Leach, A.C.J.

[15] See RCW 9A.16.020(3); Callahan, 87 Wn. App. at 929.

[16] See Strickland, 466 U.S. at 697; Foster, 140 Wn. App. at 273.